MR. CHOATE'S SPEECH.

HORACE II. DAY ADS, CHARLES GOODYEAR,

United States Circuit Court.

Before Judges Grier and Dickenson Mason Team, 1852. Refere Judges Gree and Dickensen

Masuri Tear, 1852.

After Mr. Brady had concluded—

Mr. Choate said—It has been thought due, may it please your honors, to the known engagements and probable wishes of the Court, that the counsel for the defendant should arrange, as far as may be, a distribution between their general tooles of argament, to the end that, if practicable, they may avoid anticipating and repeating one another. Under that arrangement, it will not devolve on me to address myself, at least in any degree of detail, to the numerous and apparently very difficult questions concerning the originality, novely, and priority of the plaintiff's patents, involving a collation of the testimony of anticesses, and of masses and classes of witnesses, a discussion of credibilities and probabilities, and an attempt to adjust contradictions, that the Court will, I think, at list, find irreconclable, and the argument that has just been closed, and to which we have histened, so much to our instruction, for the last two or three days, has been mainly directed. That duty of the defendant's counsel will be performed by my learned and able associate, whose familiarity with all the facts of the case, to go no farther, will be found, I trust, eminently qualified for the discharge of that duty. It is assigned to me only to open, very briefly, and coolly, and temporately, some matter of law, and most respectfully, but most carnessly, to submit, on behalf of my client, that, in the aspect of this case, this bill be dismissed; that he has a sacred, and, standing as he now does, a highly appreciated right, that the plantiff be required to establish every part of his claim by the verdict of a jury, under the direction of a court of law. This is no part of the task, which is now to be attempted. establish every part of his claim by the verdict of a jury, under the direction of a court of law. This is my part of the task, which is now to be attempted to be performed. I will not deny that, with my client sitting before me, if the Court please, that it would have afforded me, in a different state of health, and under other circumstances, no inconsiderable gratification if I could have indulged in a word or two of reply to that long and bitter series of speers and sarcasses with which my learned word or two of reply to that long and bitter series of sneers and sarcasus with which my learned friend on the other side attacked the claims and character of my client. He, himself, seems to be hardly aware how he has pursued Mr. Day where-soever and whenseever he has presented himself, or has been presented by the testimony, as a seeker or as a finder in this department of the useful arts. All that, however, may it please your honors, I have to leave, and with great pleasure, in referring in my associate counsel. I may be permitted to to my associate counsel I may be permitted to say, that the best reply to the opening argument of the other side, will be found to be an elaborate examination and exhibition to this Court of all the examination and exhibition to this Court of all the evidence, a part of which is printed in this record, and a part of which fand that by far the largery remains untaken, because Mr. Day was advised by his counsel that the merits of this cause would not be finally considered and decided in this case—I say the best reply to the commentary of my learned friend will be found, I believe, in that examination of all the evidence by which Mr. Day's pretensions, as an inventor in this department of art, should be vindicated firmly and resolutely by my associate counsel. I take my leave of it, saying only that I have seen nothing in it bearing on Mr. Day, from the beginning—nothing in the precedeus inventiveness of childhood at fourteen—nothing in that little experimental portable furnace—nothing in the maturer business life or personal character of a man, now come to the middle age of life—that warrants slander in court or out of court, or oven an unfriendly commentary. I see nothing in that evidence but the story of a man—perhaps of a rate of talent of force of will and of character. or even an unfriendly commentary. I see nothing in that evidence but the story of a man—pechaps of a rate of talent, of force of will, and of character a good deal above the average, and of a generosity large, and an integrity untouched, whose attention was directed, by a mere accident—as happens in the was directed, by a mere accident—as nappens in the whole history of invention—to this particular improvement, at a very early period of his life, who has subsequently given his youth and manhood—a fortune—many thoughts and many hopes to the realization and importance of that line of enquiry, and of whom I am sure it is not extravagant for me to say that we should have, all of us, from anything and everything anticipated a prior; that he was at to say that we should have, all of us, from anything and everything anticipated, a priori, that he was at least as likely to lay his hand upon this golden key as any of these who have been so long and so carnestly in search of it. I take my leave of it, may it please your honors, and of all this part of the case, and I commit him to a far abier defence, if defence he needs. We have the honor to give the Court a very early notice, and I do not by any means say that it would be the sole ground of resistance to the prayer of this bill in this case, that the plaintiff has strangely neglected to try to establish his title at law; and that, for the reason that he has neglected so to do, according to the settled course of this law; and that, for the reason that he has neglected so to do, according to the settled course of this Court, he is entitled to no injunction at all. Certainly, may it please your honors. I appreciate the urgent desire of this Court to terminate such a controversy as this. I believe I am speaking very feelingly for my associates, and certainly for my client, when I express my entire concurrence in this desire of your henors; and I hope the Court will allow me to have the honer (with the respect they know I entertain for them) of adding that there is an object even higher and worther than to terminate this even higher and worthier than to terminate this controversy; and that is, so to conduct it and so to close it, that every man's rights shall be found by him to have been recured according to the due course of law-to ascertain and secure his rights achave beard, that courts are constructed, and justice have heard, that courts are constructed, and justice judicially administered. If, therefore, it turns out that that direction, which we must carnestly crave this case may take, should a little prolong a controversy which has been wasting the defendant as well as his antagonist. I submit that it is not the fault of hir. Day, but of the system of law under which we live. Has my client been responsible for the prolongation of this controversy heretofore! I pray your honors judgment in saying so! In 1848, there broke out a controversy, and suits were instituted against him. That controversy he set led in good faith, without mental reservation or equivocation, or hypocrisy, intending reversy he seried in good land, without mental reservation or equivocation, or hyporrisy, intending to live and die by that settlement, as upon my con-science I believe, and I trust we can establish. Of that settlement, Mr. Goodyear by his associates, into whose hands he has suffered himself to be placed, has been deprived of every particle of con-sideration, benefit, and advantage, and they break-ing every covenant, hereaving him of every marticle sideration, benefit, and acvantage, and they breaking every covenant, becaving him of every particle
of consideration, by which, as a man of sense or of
self respect, he could have ever been induced to
enter into. What was to be done then? Should be
not have gone back to the labors of his former
life, not only from necessity, but from the general
law of the land? To those labors he went back.
The plaintiff braught, their actions against him law of the land? To those labors he went back. The plaintiff brought their actions against himbrought among others an action of covenant; and when that action arrived in the due order of trial, by client was ready, and he won that cause. Anonother action was commenced, and when that cause also reached its regular and apointed time of trial, my client was again ready, and the plaintiff was not. He made a third effort to compel Mr. Day to take trial, a month afterwards in the Circuit of blassachusetts and Mr. Justice Sprague declared that that application, then and there, was wholly an unreasonable one. The result was a postponement of this hearing to this day, and here we are, according to our mensure, ready and willing to meet this bill in chancery, not only according to the whole merits of the facts, but according to the principles upon which a bill in chancery is to be tried, and will be decided by this honorable Court. I will, therefore, say that I do think, may it please your honors, that Mr. Day has been responsible for no unnecessary protraction of this controversy; and that it will not be his fault if the direction, which justice requires this cause to take, shall prolong and protract it a little later. I do not fear that the manimess of an American judicature will regard with the least particle of judicial dislayor any man, because, standing where Mr. Day stands, in litigation for all he is worth and for all his hopes, he carnestly desires that tribunal, which he undergrands to be prescribed and preferred by the law. I have still less to fear that he will lose or suffer for that right in the slightest degree, because a newspaper editor, here or there, can be found to have made, in the progress of this The plaintiff brought their actions against himfor that right in the angulest degree, because a newspaper editor, here or there, can be found to have made, in the progress of this trial, some unguarded or intemperate remark. What a right it would be—what a mockery and not a right—it it were held upon such tenure as this! I come then to the narrow duty which is devolved on me, and I have great confidence that I shall close far within the usual hour of adjournment. They far within the usual hour of adjournment. They tell us that their bill is for an infringement; and sometimes they tell us, as circumstances punch, that it is a bill for the specific performance of a covenant One of the counsel, in one stage of his argument, is quite sure it is one thing, and another, in another range, would perhaps be quite sure it was another. The truth is, we are to look in no disrespect or in no spirit of sarcasm to the record staif. Is the first place, then, if your honers please, we respectfully aubmit that if it is to be taken and tried as a mere bill for a percetage in the control of the sabmit that if it is to be taken and tried as a mere full for a perpetual injunction upon a patent right, for an alleged infringement by the defendent, it should be tried and settled in the ordinary course, and that undoubtedly is the first aspect in which the hill is to be regarded. We have the honor to submit that it is perfectly clear that the plaintiff is not critited to the injunction be seeks, for the reason that he has totally neglected even to attempt to establish his right in a court of law. And we therefore tabult, and I have to ask your honor's attention to the proposition, that it is entirely according to the ancient and amiliorm course of chancery, that inasmuch as the plaintiff has neglected every opportunity to try to establish his title at law, he can now be there appoin nor proceed himself to try the right. only alternatives to the Chancelor will be, the shall return the bill, with leave to the

plaintiff, at this late day, to establish his title at law, or according, as I think I shall be able to show, to the later practice under the circumstances, to dismise the bill at once and altogether. We shall of course maintain many grounds of defence against the bill, but of this first, and, for my purposes, chiefly. I confess, that until that little conversation (which may perhaps be within the recallection of the court has a state of the confess. of the Court) between the counsel at the bar whea the original proposition was announced—if it had not been for that, I confess I should have understood that the general rule for which we context, was entirely beyond contention anywhere; and that general rule we have always understood to be, that a Court of Chancery, at the final hearing, which is the stage at which this debate now comes, on a cause when the courter denies the emitty. A Court of stage at which this debate now comes, on a cause when the answer denies the equity. A Court of Chancery will never perpetually enjoin on such a hill, so framed and so met, until the plaintiff shall have established his title at law, unless it shall be made clear and evident to the Chanceller, that there is no question of fact to controversy between the parties. The evidence of which, from its essential nature, may be submitted to a trial by jury. I say again, if your honors will corner Labouth have the parties. The evidence of which, from its essential nature, may be submitted to a trial by jury. I say again, if your honors will permit, I should have supposed that that proposition would have not with the universal assent of all learned persons. I do not stop here to move any question in regard to the trancendental powers of the Court of Chameery. That is not the proposition to which I mean to address myself. But I had supposed that whatever may be the newers of that tribunal, (and they are ample in England.) I had supposed it had come to be sattled universally as a general rule, that on the final hearing, when the plaintif has not lifted a finger in any stage of the cause to obtain an injunction, the answer denying the equity—the bill being nothing in the warld but a mere ordinary injunction upon a patent right—I have supposed it to be a matter of course that no injunction will be had, unless the Court, on looking into the facts, see clearly and undoubtedly that there is no matter of fact in the evidence. That proposition, however, it seems is likely to undergo dissent from the other side. I feel bound therefore, may it please your honors, before I address myself to these special circumstances which are to be relied on in the nature of an estoppal, as extreme desire to have the ground firm under my dress myself to these special circumstances which are to be relied on in the nature of an estoppal, as extracting the case from the general rule. I feel an extreme desire to have the ground firm under my feet at the outset. As to the extent and limits of the general rule, that general rule being as I understand it, exactly this, with these conditions, that the bill merely for an infringement of the patent, the answer denying the equity at the final bearing, and the plaintiff having taken no measures at all to obtain an injunction at an earlier stage, it is a matter of course that the injunction is refused until the title shall have been established at law. Now, may it please your honors, I shall of course induge myself in only a brief resumé of all the parties. They are, indeed, all upon the brief; and acting on the suggestion from the bench, instead of pausing to read them. I refer the Court to the brief, and content myself with stating what I understand to be their undoubted results. Now, your honors, will undoubtedly have remarked in the text books, and sometimes even in the prepared proofs of learned counsel at the bar, that a very great confusion has arisen from not sufficiently attending to the particular stage of the cause in which the motion comes to be made, and the determination of the Court of Chancery comes to be invoked; and it seems to me entirely indispensable in order to prepare for comprehending the decisions which appear, on the face of them, to be by scores and hundreds a reproach to the law, a stumbling block to justice. In order to approach that view—which, I apprehend, will reconcile every interest in the law, and extract a beautiful, consistent and rational system—I ask your honors, in order to prepare for such a survey of the cases, to allow me to submit that there are three stages or epochs of a cause in which this motion for an injunction comes on by right; and that the application is allow me to submit that there are three stages or epochs of a cause in which this motion for an injunction comes on by right; and that the application is disposed of by the Court in every one of these successive stages, under rules and considerations applicable to the particular stage. We are here to-day in the third stage; but, in order to approach the rules and considerations which, as we suppose will be new applicable to this particular epoch of the case, allow me to glance at the rule of each in its order. The first stage where this motion ever comes case, allow me to glance at the rule of each in its order. The first stage where this motion ever comes to be made, is upon the bill, and before the answer or evidence, even in the form of an affidavit, be given by the defendant in the cause. I do not mean to say that it is necessarily before and prior—, but it is distinguished as being upon the bill before an answer unencountered and unembarrassed by anything like opposing proof on the part of the defendant. In this stage—and it is to this stage I deem that nine out of ten of every authority that will be referred to in the course of my argument, will turn out to be referable deem that nine out of ten of every authority that will be referred to in the course of my argument, will turn out to be referable in this stage—it is granted with less difficulty, and under fewer conditions than ever after in the progress of the cause. Even in this one it is by no means a matter of course. Even in this one, more than a patent must be shown Even here some length of time of exclusive possession, or if that possession has been interrupted, the parties' right, by suit or otherwise, must be shown, in order to sustain it; but in this stage, and under these conditions, it is comparatively easy. It is provisional only. It is granted only until the hearing of a further order from the Court. The plaintiff has shown extraordinary diligered, which is always agreeable to a Court of Chancery; and, therefore, as I have said, inasmuch as it is temporary only; inasmuch as it is only for the purpose of taking into custody and taking care of a subject matter which has a litigation in prospect, and which might be wasted before that litigation terminated; inasmuch as the Court holds it in his hands ready at any moment to be brought forward, in this stage it would be comparatively easy; and, if we do not take great care, we are in danger of transferring books and cases, applicable to this stage alone, to a later stage, in we are in danger of transferring books and cases, applicable to this stage alone, to a later stage, in which it will be found that other considerations arise from the different circumstances of the case. The next stage in which this motion for an injunction is brought, is before the hearing, but after the interposition of an answer by the defendant, and after the exhibition of as much opposing proof as he chooses to introduce. The rules of the injunction applicable to this stage differ somewhat from the last, and they are found regularly and gradually increasing the difficulties in the way of combining them. Still, the court will observe that even here, in a smuch as the injunction will always be a temporary one, inasmuch as the plaintiff distinguishes rary one, inasmuch as the plaintiff distinguishes himself by an extraordinary degree of diligence, inasmuch as the suit may be dissolved at any moment, the Court grants it, even in this stage, with comparative facility. Here, however, unlike the rules and circumstances which apply to the earlier stage, a long and exclusive possession must be shown as a denial against the defendant's answer; or, if a long and exclusive possession cannot be shown, then it must be shown that on that possession being disturbed, the plaintiff promptly proceeded to establish his right by a trial at law. The injunction in this stage also is conditional and temporal; still, as I have eatd, at its more difficult than in the earlier stage; but yet comparatively casy to be obtained. Now youswill find that some of the authorities anoticonfidently relied on by the connect on the other side, for doctrines that will guide them in this case, will not be applicable to this stage of the inquiry. To this stage is to be referred the authorities anoticonfidently relied on by the conset on the other side, for doctrines that will guide them in this case, will not be applicable to this stage of the inquiry. To this stage is to be referred the authority so celebrated in law, of Hill and Thompson, 200; Merrivitle, C22. That your honors will remember was relied on by the other side, but it belongs to the previous stage, where it is comparatively casy to obtain an injunction; but as there had been an exclusive and uninterrupted possession of two years, his lordship, without advancing to even a doubt about the title, even on that stage, refused the injunction. The third stage, in which an injunction may be granted, is at the final hearing of the cause. We are in that stage, and here I understand that a totally different class of considerations ripening into a fixed cold of chancery, rule have can be regarded to the honor will be even to the stage of the injunction now, are different from the purpose of the injunction in the former stages. The effect and pu

-if he has done nothing until the defendant hasex-

pended the labors of a summer, and ten thousand dellars of money, to accumulate proofs for the trial of the course at all—if the plaintiff shall have lain, as here he has, stock still, without a motion for an injunction on the preliminary stages, the Court of Chancery has settled the dootrine that it will not even retain the hill to give him another chance, hat will dismissit, of course, and leave the plaintiff to his remedy. I shall speak to both branches of the rule. I have said that an injunction at the final hearing is, of course, perpetual. It is perpetual, or it is nothing. On this point let me turn to some of the most approved writers upon this satiset. I first refer to my brother Curtic excellent work upon patents. But the slightest natention to the authorities upon the brief, still better to the memory of the bouch, makes it certain that an injunction here is nothing at all, or it is an injunction for ever. See, then, if your honors please, how canced which is left for us of the rule for which we contend. I wish to repeat my proposition again, is order to leave ne condition of it to which attention has not been paid. In that conversation which arese, at the commencement of this trial, references were made by the most eminent counsel, to the cases in which it was thought the right to an injunction had not been paid. In that conversation which arese, at the commencement of this trial, references were made by the most eminent counsel, to the cases in which it was thought the right to an injunction had not been paid. Such was one aspect of the telegraph case, with which one of my learned friends and myself were connected, in Boston. Such was the case, in the same great cause, in another of its branches, tried by your honors. By the consent of parties, anything may be done to vary the direction. These cases, as your honers know, involve matters of pure science, and it was thought better, for many reasons, not to commit the cause to another tribunal for the hearing of a jury, or at least in expedient to with pended the labors of a summer, and ten thousa of the bench. Those cases did not turn en such points as this—whother Earl had been guilty of inceny. They did not turn upon whether Collins perjured himself, or is an honest man. It did not turn upon whether Pratt, in this case, is corroborated by ten witnesses, or eleven witnesses, or whether Heyward was a dreamer. They do not turn upon such considerations or upon such exit. turn upon whether Pratt, in this case, is corroborated by ten witnesses, or oleven witnesses, or whether Heyward was a dreamer. They do not turn upon such considerations, or upon such evidence; and your honors will bear me out in saying that half an honr's exhibition of the witnesses on the stand, under the cross-examination of counsel, and under the gaze of twelve laymen, would reveal the truth more certainly than many labors of days and nights upon artificial technicalities, that are embodied in these records. They were a trally different class of considerations; and therefore it was that they were drawn together to the Courts of Chancery, but subject to that qualification, I have the honor to repeat, and we feel that we are here in some measure certainly respecting this Court and our opponents and ourselves too much to declaim about the jury trial, but we are here upon what we deem an important, and, perhaps, to the defendant, novel and most important point of practice. Now, I move no question at all with regard to an abstract power of a Court of Chancery in this behalf. On the contrary, I do not deny that power, as I shall show by the great Chancellor Lord Cottingham. I shall find him at the same time that he is administering this rule, temperately and exactly—I shall find him asserting, as your honors will assert, the very highest tone of doctrine with regard to the abstract power of a Court of Chancery in its theory; but what I will say is this: there are practical limits to this great power—this power held and wielded in the actual administration, are perfectly defined. These limits are perfectly defined and exactly within control, and it is just as clearly settled, and by as long, and wide, and uniform a concurrence of practice that while your honor's power to grant the injunction is indisputable, though the heavens should pass that gigantic power, has been wielded with a temperateness, and dignity, and security of rights which should always accompany and regulate the administration of a power so large. replied:We stand in the specific case of a patent right, and We stand in the specific case of a patent right, and in the discussion on this point, I shall found my remarks in part upon the circumstance that it is a patent right. It seems to me that it may stand to some extent upon the distinction, if your honors please, on which Livingston, and _____, in the ninth of Johnson, was decided. It was held, and it is exactly a principle which I recognise, and which I contend for in this, that inasmuch as the controversy in that case did not turn in any degree upon matter of fact fit and proper, and needful, to be examined by a jury, but only upon the constitutional right of elegislative grant; and this case of the Wheeling Eridge is a question of a constitutional grant of a State. We are contented, if the Court please, to advert to this case to which they have made reference, so far as to say that it preceded upon a ference, so far as to say that it proceeded upon a distinction between Legislative grants where the matters of fact are supposed to have first been carefully appreciated by the Legislature, so hat there

distinction between Legislature, so that there is mainters of fact are supposed to have first been carefully appreciated by the Legislature, so that there is nothing left for substance but the constitutionability of a grant. May I be permitted, then, if the Court please, to return, and confining uyself to the bill before the Court—a bill for the utringement of a patent right—to subsuit that, in the history of the law, no such injunction has ever been adjudicated at a final hearing. In 1837, Lord Cotting, bam, in the case of Milman & Craig, while he roceanized the power of the Chancery, declared that he knew no case in which it had ever been exerted. I take it that will do for Chancery on Patents down to 1849, and ask my learned friends on the other side to produce a case adverse to my proposition from 1850 down to this time. Well, they will say they have given us some, and this will admirably illustrate, if nothing mose, the confusion into which our text books sometims will lead learned counsel in the preparation of their arguments; for here is a reference, on the first page of the plaintiff's heief, to some ten or twolve authorities, every one of which is ear authority applicable only to the second stage of a motion for an injunction, and not one of them referring, in the least degree, to the new and great question on which we have to pray the jedgment of this Coart. There is, for example, the 3d of Curris, 328, where he speaks of a motion in the first stage; 329 is another upon the second stage. The third case which they cited is altogather too good not to be read aloud in proof of the general reposition upon which I now stand. Curtis Patents.) So much for the general doptime of the case is printed upon the same brief, are all answered, if your honors please, by a little attention to the period in the case to which they release at lar. When your honors consider for about a couple of centuries, earlied back of the English chancery cases, and for sixty years of reports any becaried back in this behalf, I do sub social law. It is, then, a deduction from the nature and constitution of chancery, in any jurisdiction which it has over such rights as these; in all its jurisdiction it follows the law; and although I do not mean to read from authorities to much extent, I think it proper to read the Court one passage, in as much as certain important consequences flow from it, from an authority named in the brief, (Heinmarche, 157 and 366, sec. 3.) which sets forth that the privilege conferred by a patent is a legal right, and is only to be tried by the common law of the realm. Mr. WEBSTER-Will you read the passage? It is

Mr. Wenster - Will you read the passage! It is not contained in the statute of monopolies.

Mr. Choare — I understand the criticism, Mr. Webster, you would put upon it, and I will take up that point directly. Before I turn to the Statutes at Large, let me fortify the just observation of Mr. Heinmarche by Mr. Thompson, an American, but a dearer and more venerable name—a great lawyer, in all the fields of the law, a great patent lawyer and the tariff; it complains of him not that he does not pay the tariff; it complains of him not that he does not

Chancellor pre-eminently, (let Paine, 446, Sullivan and Redfield.) He then proceeds to one very important consideration, no longer new nevel, and that is, that our own legislation makes no distinction in their behalf; and let me seld; that that learned Judge is speaking to an application in an earlier and easier stage of a motion for injunction. Now I will turn your attention, as a question has erion upon the socuracy of the citation, for one moment only, to beach Third, page 91, of Statutes at Large. The first section is a section declaring all monopolies to be void. The fifth section speaks, nevertheless, of the rights of patents. Then I argue that the second section means to say that the common haw of the naim shall declare, in any given and controverted case, whether is a patent for nevelty or a monopoly sholished by the first section of the act, for the language is substantially this. My construction is this—the first section aboushes monopolies; the fifth section declares that a patent for a new invention is a legal right; and that leaves it a subject of great debate whether the grant of a patent is valid, or whether the second section croots a judicature by which the commons of England will that that quastion shall be determined. However this may be, can'ty follows the law. Now, what is the meaning of the maxim, that equity follows the law? In this case, I apprehend, it means that it shell refer to the common law of the realm to determine in its own inburnals the existence of the legal right, and, that dere, then, by its own peculiar and characteristic powers chancery lends its aid to protect the alleged light, until it can be determined whether it is a right or not, to protect it after it has been a scertained to bear right—protection, not assertainement protection, and not a mere enterprise to resolve a riddle of injat, until it can be determined whether it is a right or not. to protect it after it has been a secrtained to bee right—protection, not assertaines to resolve a riddle of right, ca muria cancelar it. I submit to this Banch that these limits and marks are the demar action between those two great auxiliary institutions, clerrly and admirably defined, and are according to all our ideas of right and justice. What could we desire better, if we were dreaming of another Utopia? What botter institution could we desire better, if we were dreaming of another Utopia? What botter institution could we desire for the determination of a right—a right depending upon the credibility of that man, or on the memory or source of fancy of this—a right despending upon the judgment of experts, or on the interpretation of grants—what so appropriate as a learned judge? When the case has passed from the first stage, or after the bill is filed and answered, what so admirable and so perfect as the transcendent power of chancery, which secures the right forefer to him to whom the law has already ascertained it to belong? Finally, the language in every case in the law, is a concurrent demonstration and illustration of this very doctrine. Every adjudged case, and the learning of one of my associates has embled me to place, chronologically upon the brief before your henors, a series of judgments for one hurdred years, beginning in 1766, and coming down to 1849—every adjudged case, from the beginning, announces this very doctrine of adjudication. There is to case of Hardwicko. There is the greater case, because living at a later period of the Lord Chancelor Livingston, in the third of Merrivale. There is to case of Hardwicko and the learned decisions on the English bench has sufficed for all later cases. I therefor respectfully submit, may it please your honors, that the general rule is placed beyond a particle of list bench has sufficed for all later cases. I therefor respectfully submit, may it please your honors, that the general rule is placed beyond a particle of controversy, and it will not be in this court that that general rule will be brought into question. I shuid learn this doctrine very incomplete, if I did no remind your honors of one exemplification and application of it, apparently newer, but yet perfectly sertain, and that is, if it turns out that the plaintifiacks for no injunction till the final trial, if, at the final trial it appears to the court that he has been guity, in their judgment, of laches in not claiming it in his bill, before the final hearing of the bill, will not be retained to allow him an opportunity then to final trial it appears to the court that he has been guilty, in their judgment, of laches in not claiming it inhis bill, before the final hearing of the bill, will not be retained to allow him an opportunity then to ge back to law, but will be dismissed as a matter of course; and that has been settled, if your honors plesse, by an adjudication in the first of Benou, upon the brief, (Spottiswood & Baeou), and brought from him by appeal to Lord Chancellor Cottingham, who deliberately confirmed that practice. As I shall not return to that topic, may I not, before I dismiss the subject, ask your honors if that case is not this case. Sir, to this day, we never had any mittee that the plaintiff moved an injunction on the general ground that he was entitled to it, on this lill. At the discussions of last November or Octoler, notice was indeed given for the first time that in injunction would be moved for on the special form of the bill, I mean to say it was a bill for a specific performance; but it was not until our friend began his opening argument that the plantiff moved or an injunction on the general rule of the right of a party on the general form of this bill; and your honors will consider whether or not, under the circumstances of the case, inasmuch as he might have done it on the coming in of the bill, or on the filing of our answer; and you will entertain, and you will consider whether there was anything wanting to our exertions to bring on the cause, whether or not May it please your honers, I fear I am attempting something too much upon the general rule; but I must ask, is this case within it? It is said that it is not, for some one, two, or three reasons. Perhaps I imperfectly accompanied them in the argument of the learned coursel. May I, before I enter upon it, offer one werd of authority?—(Curtis, 359) It is said, then, in the first place, that this is not within the ordinary rule, because It is said that It is not a bill for an infringement of the patent, for a perpetual injunction, for an ordinary for the examination of a jury under the direction of the court. These are the three general grounds on which I understand they claim that this case is extracted from the general rule. Now, in the first place, it is suggested that it is a bill for the specific performance of a settlement, which settlement estops the defendant from derying the validity of the patent. It is not really a bill for the specific performance of one or the other of the contracts. To this I answer, may it pease your honors, if it is established in point of fact, this is a perfect answer to the general rule, and that if this be taken as a bill for the specific performance, and if the covenants do on ground of fact estop us, and are to be enforced, there is an end of the matter. Is it then to be taken to be a bill for the specific performance of the centracts, but not a formance, and if the covenants do on ground of fact estop us, and are to be enforced, there is an end of the matter. Is it then to be taken to be a bill for the specific performance of the contracts, but not a bill for infringement? Can an injunction upon infringement be moved for in the ordinary form? And, as such a bill, can it stand for a measure upon the undisputed facts now before this court? Now, I am disposed to admit that, although perhaps it is not drawn in the most artistic manner, and from some policy on the part of the pleader, yet we do suppose, and we always have supposed, that it was to be presed simply as the specific performance of a covenant, and I assure your hands, upon my personal veracity and character, we came to this trial on the opening of the Gourt, and we have made every particle of our preparation, from last October, upon the supposition that we were to deal with nothing under neaven but a bill for a specific performance of a contract, to which bill we were hat hand, to hold ourselves ready to answer. Your honors may be aware that Mr. Day, under the advice of his connect, or the greater number of them, hanactually neglect do come here attended with evidence to prove his ability to say, "I also am an inventor," and to prove the long series of his young attempts to signalize himself in the line of discovery in the calling he had chosen. It is under that advice, founded upon what we have always understood to be the prayer of the bill, that he comes here to day unprepared to most the case which a partion of my learned brethers' argument presents for us or meet. We thought in a hill for a specific performance, and we so heard it reported from every source, and I refer for confirmation on this point to the distinct subject of this prayer, and that our admirable brother Curtis, now a justice on the bench with your honor, made an application to the Court to be heard upon that bill upon the ground that it would give the Court no trouble to investigate the facts, but that it presented matters bill binding the defendant not to dispute the validity of the patent. It states a settlement of a controversy between parties, by covenants, but it does not prove them. If the Court will turn to the fifth page of the defendant's record, containing their answer, your honors will find that it sets out, in detail, the fact of the settlement then and there entered into, and a great veriety of covenants; that he promised to stamp the shirted goods of his manufacture: that he promised not to manufacture outside of the license which he took, to pay a tariff, and to keep an account upon the amount manufactured. It states the settlement, and it states the covenants, and therefere, as I understood from that part of this form, it is a bill for a specific performance. So it may be taken, may it please your honors; but, then, a specific performance of what? I have the honor respectfully to submit, in the first place, that it cannot be maintained, for an instant, as such a bill; and, in the next place, that it presents no matter, according to the rules of Chancery pleading, to the notice of this Court, under which the defendant is to be estopped, under any construction of the bill, from the right of hitigating this cause in any court. It is a bill for the specific performance of what? Why, simply for the specific performance of a single one of all the covenants contained on Day's side of the settlement. It prays on account not of what Day has done under his because—not that he does not pay the tariff; it complains of him not that he does not pay the tariff; it complains of him not that he does not pay

keep an account under his licenses—but it specially and expressly excepts from the prawer of a receivily and expressly excepts from the prawer of in the world but what he has done outside of this receive, and therefore I repeat that it is, beyond any controversy whatever, then, as a bill for the spacing performance of the coverant contained an page 45 of the defendant arreased, and of nothing also in the world. Now, then, turning back from that covenant to page 7 of the plaintiffs bill, your henor will flad that they ask that the defendant may read a his account of the articles made, &c; except where such that they ask that the defendant may read a his account of the articles made, &c; except where such that the world do nothing outside hit learness except that he would do nothing outside hit learness except that he would do nothing outside hit learness except that he would do nothing outside hit learness except that he would do nothing outside hit learness except that he would do nothing outside hit learness except that he would do nothing outside hit learness except that he would do nothing outside hit learness except that he would do nothing outside hit learness except and the such that the would be nothing outside hit learness the such that the plantiff such that the plantiff such that the plantiff such tha henors please, for in the next place, does not that verict go a good deal deeper than this? The court avers that the verdict on the seventh issue finds, not merely that Goodyear did not protect, but connived at the infringements of other persons with Mr. Day's business. If the court will allow me to turn to the 74th page of the Record, and to call their attention to the seventh plea, they will find it concludes, that an issue is taken upon it, and then the defendant says, "protect this defendant," &c. And on that issue the jury affirm the truth of the plea. If they, it be successfully established, not merely that Mr. Goodyear has not protected the defendant in this case, but connived at the commission of in fingements aimed and pointed at Mr. Day, then I have to ask the court whether the third covenant contained in Goodyear's original settlement with Mr. Day, has or has not been broken on his part. If it has been, it goes a great deal deeper than a mere discharge from a covenant to protect, for it discharges every one of the covenants in the settlement from beginning to end. The language of that covenant is this—that "said Goodyear will not hereafter grain any right, license, or agreement," &c. Now, if the jury have affirmed that he did consive at the manufacture of these goods by other access, in viciation of his dety to protect, it is for your honors to say of this agreement, in this third covenant, that he shall by no agreement, assuming the manly form of a direct covenant on the one head, or sacching under the denomination of covenant or the other, that he will by no means aid or ahea, or a far as in him lies, permit anybody to interfere with Mr. Day in the exclusive monopoly of the article which it was the object of one party to sell, and the other party to buy. I submit, without there with air I bay in the executive monopoly of the article which it was the object of one party to all, and the other party to buy. I submit, without cites a step further, on the mere verdict of the jury, that it is fer your honers to say whether that can not be the end of the case. I do not know that it may not geing a step further, on the mere verdiet of the jurs, that it is fer your honers to say whether that can not be the end of the case. I do not know that it may not be said that action may have been taken on de murrer. I will deal frankly with the Court. I will not say but that I have to show whether or not the plea is double, and issue is taken on the whole, which makes a double averment, and whether there is an estopel on both averments. However that may be, we go, on the evidence, a good way beyond this. I understand the argument of the learned counsel to be, that though Goodycer may not have afforded protection to Bay, down to the 1st of January, 1349, that still, if, he has afforded him protection since that time, Day's covenant is still binding. I shall hereafter inquire, if your honers please, whether or not, in point of fact, Mr. Goodycar has afforded the heat protection to Mr. Day; but I am new about to submit this proposition—and only submit it—and leave it to the judgment of the Chancelior; if it is to be taken, as it must be, to be conclusively established, that for two years and some months, the plaintiff did not protect Mr. Day at all; and if it be further true, that theroupon Mr. Day, deprived of the protection for which he had bargained, was driven from the business in which he had stipuiated to be protected, and forced to enter into another branch of the manufacture. I have to submit that it is not a resumble construction, that after all that, Mr. Goodycar may wake up and demonstrate an offer of protection, beginning two years after the covenants had been made, and then insist on driving Mr. Day nack again, after be had invested himself in another, into the business in which he nagreed to protect him, and from which his want of protection for two years and a half, and that the consequence was that Mr. Day from the first, is to begin the protection, and is to continue it constantly, effectually, and zealously; and unless that is done, Day is not bound at all!

And therefore I say, if your honors

that want of protection, which compelled him to shardow the work he atipulated to be allowed, and protected, to do, and forced him into another; therefore, I say, that the effect of it is, after the interprion of two years and a quarter, wholly to discharge Mr Day from this contract. The language is, that while Day is protected he shall do making clae but this—that is, while he is continually protected by a protection beginning at the first, or within a ressenable time after making the agreement; a protection steadily, effectually, and continually enforced—to a protection withheld till he is drive from the market, and compolled, the heat way be can, to find another; and then, fitfally, expicitually enforced—to a protection withheld till he is drive from the market, and compolled, the heat way be can, to find another; and then, fitfally, expicitually and intermittingly resumed; and thus drive him backward and forward, this year in one thing, and next year in another thing, at the sale will and pleasure of Goodycar himself. Now, I think that this construction is aided, not to say conclusively forced upon us, by a settled docurins relating to matters of specific performance—for example, it is a familiar doctrine, that if there is any unfairnest or neglect, or laches, on the part of a plaintiff, he shall not have the extraordicary aid-of a Court of Chancery to compel the performance of his own side of covenant. And again if there has been a change of circumstances, arising from any cause, or if arising from the conduct of the plaintiff himself, there has been a great change in the circumstances of the parties, after the contract was originally made, and before the time when he applied to a Court of Chancery to compel its performance, he must submit his time to which the voluct in this case extends the want of protection, that is to say, before the first of January, 1849, completely driven from that employment, and compelied to about a time in his life. If we show you, upon the evidence we introduce. In the first pl Day were materially impaired; and the jury found what we have here averred to be true, and the same jury established the fact that Goodycar gave him no manuer of protection for two years and a quarter; and the very same jury, on another trial, established that probable, natural, and material fact, that, for the want of that very protection, the profits of his business had been materially impaired, but they could not find from the form of the contract that he was obliged to abandon that employment and enter another; and I am now about to add to the proof of the verdict, the evidence upon this point, by a very brief allusion to it. We shall show you this, by the testimony of thirteen witnesses, though I am not about to read even their names—I will state the result. We proved by this body of evidence, uncontradicted by one scrap of proof in this whole case, that this failure to protect Day, shown by the jury to last till the lst of January, 1849, had the effect of fostering a rainous competition, which compelled him to abandon the business of making and vending of this form of shirred or corrugated goods, and compelled him to withdraw himself to another branch of the same business. We equally find, coincident exactly with the period of time to which the question refers, this revolution in his employment—as prosperous and as well conducted a business as a Jerseyman ever carried on in his life—completely destroyed, and himself entering upon the introductory stages of a new business, diven thereto by the direct consequence of Goodycar's act. Now, the general result of their testimony is this:—That, at the time these covenants were entered into, Mr. Day was engaged in the manufacture of that form of shirred or corrugated goods, which we call suspenders; that his suspenders were the best in the market; that he knew how to do it well, and was doing it well; that it was a prosperous and profitable business, and this covenant was made to continue him, with the same success and prosperity, in that employment; that after th been the ground they have been arguing; we aver a failure to establish such a protection, (and prove it by the verdiet) for such a length of time, and the consequences of it are such, that it becomes inequit-able that that covenant should be revived against him by any wortuless offer of protection by Good-year. Even, therefore, if this bill alleged, and if the case showed, protection, after it was too late, the case showed, protection, after it was too late, this Court, I apprehend, will not allow this oovenant so to run back, and operate so fitfully, and by intermi tance, and so to stop when Goodyear chooses, withhelding protection to Day, till Day is terishing, and when he is pretty nearly ready to die, patting his finger upon his pulse, and letting in a little air and a fittle light, in the form of pretection and then call on him once more for his coverant. I submit that he cannot thus play upon Day as upon a pipe. This would be semething worse than the celebrated letter of Dr. Johnson. It would be the patron of the drowning man who withholds assistance, and does not encumber him with sid while he is drowning, but who waits till he is drowned, and bestows it upon him at the Coroner's inquest. Such protection is not stipulated. I am still dealing, may it please your honors, with the proposition on the other side, that although there was nfailure to protect, for two years and a quarter, still it they could have proved that after the expiration of that time, the protection so long forgotten was continued. Then this covenant would come ehend, will not allow this gove still dealing, may it please, your honors, with they proposition on the other side, that although there was a failure to protect, for two years and a quarter, still it they could have proved that after the expiration of that time, the potection so long forgotten was continued, then this covenant would come again to life; and I have submitted that it is a wholly unreasonable interpretation of the covenant; for, so long a neglect of protection had charged the position of Mr Day, and deprived him of what protection was to give, and had driven him for a substitute somewhere clse. But I have not quite done with this part of the case. If I mistake not, there is a view in which this pretended protection may be placed before the Court; or rather that protection of the real plaintiffs whom I am protty soon to develore, will appear to your honors in a bold and striking enormity and deformity of injustice. New, in determining whether this failure to protect for such a length of time, and after these corsequences have followed, should, or should not, preclude Goodyear from afterwards setting up a late and inacequate protection, as a reason for reviving the covenant, whose animation he had temporally destroyed. I ask your honors to take notice of one creumanence of great importance in the proof, and that is, if the court please, that these very conjections, who thus take advantage of Goodyear's want of protection, to fill the markets as the licenses of Goodyear, holding outstanding licenses at the time when he made his covenant, and whose licenses he agreed to get up; that after it was arranged that they would surrender the licenses outstanding, and stop working by the first of January, every man of them, in direct and gross fraud on the covenant with Goodyear, and, through Goodyear, with Day, set to work to manufacture the raw material or the fabric for suspenders. During the two or three months which was left for them to work in though the day time, in which they might at they proceeded in accumulated in two or three year had driven him from that in which he was to have been protected. The covenants were, that while he is protected in making suspenders, he will do nothing size, and these men, in fraud of their own agreements, drove him from that business, and then say he is still bound to do nothing cise. If there was ever an estopel granted on such a demand, this, I should think, must be its lowest degree. Another proposition is, that after these licensees agreed to surrender their licenses, in the fall of 1846, and to do no more work after the first of James y. 1847, they proceeded to enact a gross fraud upon their agreement, because they proceed to desert their original ceutse of doing their business, by force of which they crowded are to work and more results into those three months than they and more results into those three months than they had done for two years before. I propose in the